

CERTIFIED FOR PARTIAL PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

RON BURNS CONSTRUCTION
COMPANY, INC.,

Plaintiff and Appellant,

v.

DAVID R. MOORE, as Trustee, etc., et al.,

Defendants and Respondents.

E047077

(Super.Ct.No. RCV076323)

**ORDER MODIFYING OPINION AND
DENYING REHEARING;
SUPPLEMENTAL OPINION UPON
DENIAL OF REHEARING**

[NO CHANGE IN JUDGMENT]

THE COURT:

Respondents' petition for rehearing is denied. The opinion filed in this matter on May 11, 2010, is modified as follows:

1. On page 4, in the second paragraph under subheading B, after the sentence, "Before filing it, however, he contacted Moore's counsel in the hope of settling the attorney fee claim," insert the following new sentence:

At this point, Moore was represented by Attorney Nolan E. Clark.

2. At the bottom of page 5 and top of page 6, delete the paragraph beginning with "On March 19, 2008 . . ." and replace it with the following paragraph:

On March 19, 2008, Burns filed a motion for relief from default under section 473. On June 4, 2008, Moore filed substitutions of attorney, replacing Clark with J. Brian Watkins. Also on June 4, 2008, Moore (through Watkins) filed its opposition to the motion under section 473. In it,

Moore did not deny that Clark had granted the extensions of time.³ Indeed, Moore did not submit any declaration or other evidence in opposition to the motion. Rather, Moore argued only that, because the motion for attorney fees had already been denied, the motion under section 473 effectively sought reconsideration, in violation of section 1008.

All remaining footnotes in the opinion are renumbered accordingly.

3. On page 12, delete the first full paragraph, which begins with “Here, Moore’s counsel has never denied granting at least two extensions of time. . . ,” and replace it with the following three paragraphs:

Moore argues that we should presume that the trial court made an implied factual finding that the claimed extensions were never granted. Under “the doctrine of implied findings . . . the appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment. [Citations.]” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271-1272 [Fourth Dist., Div. Two].) Here, however, the evidence that they were, in fact, granted was uncontradicted. In its opposition to the motion under section 473, Moore did not dispute that the extensions were granted and did not submit any contrary evidence. Thus, any implied finding that the extensions were not actually granted would not be supported by substantial evidence.

The only possible factual issue was with respect to whether the third extension was granted until October 29 or October 31. Even assuming, however, that it was granted only until October 29, by that time, the wildfires were already disrupting Burns’s counsel’s law practice. Hence, the difference is immaterial. Moreover, Burns’s counsel faxed a letter to Moore’s counsel confirming that they had agreed to an extension through October 31, and it was not until October 31 that Moore’s counsel denied this. Accordingly, Burns’s

³ Earlier, Clark had denied extending the time to file a memorandum of costs; however, he had not denied extending the time to file a motion for attorney fees.

counsel's reliance on his adversary's apparent agreement to an extension through October 31 was at least excusable.

Moore's counsel granted each extension even though the previous one had not been timely filed with the court. His client benefited from the extensions, because it gained the opportunity to try to settle Burns's claim for attorney fees. Under these circumstances, Moore is taking advantage of Burns's counsel's mistake in precisely the manner that is disfavored by law, to say nothing of common decency. The failure of Burns's counsel to file a timely written stipulation is therefore excusable neglect as a matter of law.

5. The following supplemental opinion upon denial of rehearing is not to be published.

SUPPLEMENTAL OPINION UPON DENIAL OF REHEARING

Moore filed a petition for rehearing on May 26, 2010, contending, among other things, that it is entitled to a rehearing under Government Code section 68081. We reject that contention. That section applies only when the court has rendered a decision based on "an *issue* which was not proposed or briefed by any party to the proceeding." (Italics added.) Moore has not identified any such issue; it has merely identified certain new *cases* pertaining to an issue that was already fully briefed.

Also in its petition for rehearing, Moore noted that a trial court can make a grant of relief under Code of Civil Procedure section 473 conditional on payment of the opposing party's costs and attorney fees. (Code Civ. Proc., § 473, subd. (b); *Prieto v. Rivero* (1979) 95 Cal.App.3d 275, 277.) It argued that, instead of awarding Burns costs on appeal, we should remand for a determination of whether *Burns* should be required to pay *Moore's* costs. In the trial court, however, Moore never suggested that the trial court should grant the motion only conditionally or that it should award Moore costs. We therefore conclude that this contention has not been preserved for appeal.

Other than this modification, the opinion remains unchanged. This modification does not effect a change in the judgment.

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.